

THE HONORABLE JOHN C. COUGHENOUR

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JANE DOE, Individually and on Behalf of All
Others Similarly Situated,

Plaintiffs,

vs.

MICROSOFT CORPORATION, a
Washington Corporation; QUALTRICS
INTERNATIONAL INC., a Delaware
Corporation; and QUALTRICS LLC, a
Delaware Limited Liability Company,

Defendants.

Case No. 2:23-cv-0718-JCC

**DEFENDANT MICROSOFT
CORPORATION'S REPLY IN
SUPPORT OF ITS MOTION TO
DISMISS PLAINTIFF'S COMPLAINT**

NOTE ON MOTION CALENDAR:
SEPTEMBER 11, 2023

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

		Page
1		
2		
3	INTRODUCTION	1
4	ARGUMENT	2
5	A. Plaintiff Has Not Identified Any Well-Pleaded Facts to Sustain Her Claim.	2
6	B. Plaintiff Consented to Kaiser’s Provision of Information to Third Parties.	4
7	C. Plaintiff’s CIPA Claims Should Be Dismissed.....	5
8	1. Both Plaintiff’s CIPA Claims Fail Because She Has Not	
9	Sufficiently Alleged that Microsoft Could Identify Her.....	5
10	2. Plaintiff’s Section 631 Claim Fails Because She Does Not Allege	
11	Microsoft Used Telephone or Telegraph Wires.....	6
12	3. Plaintiff’s Section 632 Claim Is Deficient and Must Also Be	
13	Dismissed.....	7
14	D. Plaintiff’s Other Privacy Claims Are Fatally Deficient.	7
15	E. Plaintiff’s CFAA Claim Fails Because Plaintiff Has Not Pleaded a	
16	Covered Intrusion and Cognizable Loss.	8
17	F. Plaintiff’s Unjust Enrichment Claim Must Be Dismissed	9
18	G. Plaintiff’s UCL Claim Fails.....	10
19	H. Plaintiff’s Larceny and Conversion Claims Must Be Dismissed.....	11
20	I. Plaintiff Cannot Assert Punitive Damages.	12
21	CONCLUSION.....	12
22		
23		
24		
25		
26		

TABLE OF AUTHORITIES**Page(s)****Cases**

<i>Agape Family Worship Center, Inc. v. Gridiron</i> , 2016 WL 633864 (C.D. Cal. Feb. 16, 2016).....	12
<i>Andrews v. Sirius XM Radio Inc.</i> , 932 F.3d 1253 (9th Cir. 2019)	9
<i>Brodsky v. Apple, Inc.</i> , 445 F. Supp. 3d 110 (N.D. Cal. 2020)	3
<i>Brown v. Google LLC</i> , 525 F. Supp. 3d 1049 (N.D. Cal. 2021)	4, 5
<i>Byars v. Goodyear Tire & Rubber Co.</i> , 2023 WL 2996686 (C.D. Cal. Apr. 5, 2023)	3, 4
<i>Campbell v. Facebook, Inc.</i> , 77 F. Supp. 3d 836 (N.D. Cal. 2014)	10
<i>Cook v. GameStop</i> , 2023 WL 5529772 (W.D. Pa. Aug. 28, 2023)	<i>passim</i>
<i>Cottle v. Plaid, Inc.</i> , 536 F. Supp. 3d 461 (N.D. Cal. 2021)	9
<i>Doe v. Goldman</i> , 169 F.R.D. 138 (D. Nev. 1996).....	6
<i>Doe v. Meta Platforms, Inc.</i> , No. 3:22-cv-03580, Dkt. 298 (N.D. Cal. Aug. 15, 2023)	8
<i>In re Facebook Internet Tracking Litig.</i> , 956 F.3d 589 (9th Cir. 2020)	11
<i>In re Facebook, Inc., Consumer Priv. User Profile Litig.</i> , 402 F. Supp. 3d 767 (N.D. Cal. 2019)	3
<i>In re Google Assistant Privacy Litig.</i> , 457 F. Supp. 3d 797 (N.D. Cal. 2020)	6
<i>Greenley v. Kochava, Inc.</i> , 2023 WL 4833466 (S.D. Cal. July 27, 2023)	11
<i>Grouse River Outfitters, Ltd. v. Oracle Corp.</i> , 848 Fed. App'x 238 (2021).....	11

1	<i>Hammerling v. Google LLC</i> ,	
2	2022 WL 17365255 (N.D. Cal. Dec. 1, 2022)	10
3	<i>Hammerling v. Google LLC</i> ,	
4	615 F. Supp. 3d 1069 (N.D. Cal. 2022)	10
5	<i>Ji v. Naver Corp.</i> ,	
6	2022 WL 4624898 (N.D. Cal. Sept. 30, 2022)	11
7	<i>Katz-Lacabe v. Oracle America, Inc.</i> ,	
8	2023 WL 2838118 (N.D. Cal. Apr. 6, 2023)	10
9	<i>Kroeger v. Vertex Aerospace LLC</i> ,	
10	2020 WL 3546086 (C.D. Cal. June 30, 2020)	12
11	<i>Kwikset Corp. v. Super. Court</i> ,	
12	51 Cal. 4th 310 (2011)	10
13	<i>Low v. LinkedIn Corp.</i> ,	
14	900 F. Supp. 2d 1010 (N.D. Cal. 2012)	12
15	<i>Mastel v. Miniclip SA</i> ,	
16	549 F. Supp. 3d 1129 (E.D. Cal. 2021)	6
17	<i>Mayhall v. Amazon Web Services, Inc.</i> ,	
18	2022 WL 2718091 (W.D. Wash. May 24, 2022)	4
19	<i>In re Meta Pixel Healthcare Litig.</i> ,	
20	2022 WL 17869218 (N.D. Cal. Dec. 22, 2022)	6
21	<i>Moore v. Centrelake Medical Grp., Inc.</i> ,	
22	83 Cal. App. 5th 515 (2022)	9, 11
23	<i>Panoyan v. Regalo Int'l LLC</i> ,	
24	2019 WL 8758897 (C.D. Cal. Oct. 25, 2019)	12
25	<i>Rodriguez v. Google LLC</i> ,	
26	2021 WL 2026726 (N.D. Cal. May 21, 2021)	10
	<i>Rojas-Lozano v. Google, Inc.</i> ,	
	159 F. Supp. 3d 1101 (N.D. Cal. 2016)	10
	<i>Smith v. Facebook, Inc.</i> ,	
	262 F. Supp. 3d 943 (N.D. Cal. 2017)	4, 5
	<i>Straubmuller v. JetBlue Airways Corp.</i> ,	
	2023 WL 5671615 (D. Md. Sep. 1, 2023)	4
	<i>Switzer v. Wood</i> ,	
	35 Cal. App. 5th 116 (2019)	11

1	<i>Warth v. Seldin</i> ,	
2	422 U.S. 490 (1975).....	4
3	<i>In re Yahoo Mail Litig.</i> ,	
4	7 F. Supp. 3d 1016 (N.D. Cal. 2014).....	6, 8
5	Statutes	
6	18 U.S.C. 1030(g).....	9
7	Cal. Penal Code § 496.....	11
8	Cal. Penal Code § 631.....	2, 6
9	Other Authorities	
10	California Constitution.....	8
11	Fed. R. Civ. P. 8.....	3
12	Fed. R. Civ. P. 10.....	6

INTRODUCTION

In its Motion to Dismiss, Microsoft showed that Plaintiff failed to state a claim on her flawed theory of liability against Microsoft—*i.e.*, that Kaiser allegedly misused “Microsoft SDK” on Kaiser’s website to purportedly transmit unspecified information about “Kaiser Members” generally to Microsoft. Plaintiff does not meaningfully respond, instead repeating her conclusory and vague allegations about “Kaiser Members,” ignoring Kaiser’s easily locatable Privacy Policy, and asserting that because she claims Kaiser collected her PHI, she has therefore stated a claim. But Plaintiff cannot state a viable claim by simply declaring she’s done so. Kaiser’s Privacy Policy expressly disclosed that third parties may collect certain information from website users, and Plaintiff’s invocation of HIPAA and PHI does not allow her to skirt her pleading burden.

The Court should dismiss the Complaint with prejudice because:

First, Plaintiff does not allege particularized facts about *her* experience, but rather relies on vague allegations about “Kaiser Members” generally. But as the court held in *Cook v. GameStop*, 2023 WL 5529772 (W.D. Pa. Aug. 28, 2023), a similar wiretap and privacy class action under Pennsylvania law, a plaintiff must plead the specific “private facts” allegedly intercepted that give rise to her injury. *Id.* at *4. Plaintiff does not allege facts plausibly showing Microsoft intercepted any of her private information. She merely claims she used the search function, viewed non-specific records, and made unidentified appointments for unidentified persons on the Kaiser website. Compl. ¶ 7. She does not plead when her activity occurred or whether (and which) Microsoft services Kaiser was using when she visited Kaiser’s site. *Cook*, 2023 WL 5529772, at *7. She also fails to plead whether Microsoft actually collected any data about her, much less in a way that could be connected to her, or any concrete harm she allegedly suffered as a result of Microsoft’s alleged conduct. *Id.*

Second, Plaintiff does not dispute that Kaiser’s Privacy Statement disclosed that Kaiser would log her browsing data and provide it to third parties, or that the Privacy Statement appeared on every page of Kaiser’s website, including the page where Kaiser website users sign into their

accounts. Plaintiff's claims rest on the fact she logged into her Kaiser account. Compl. ¶ 7. By logging into and using the Kaiser website, she consented to Kaiser's Privacy Statement and thereby to Kaiser's alleged transmission of her alleged data to Microsoft. That, too, bars Plaintiff's claims.

Third, Plaintiff's claims suffer several other deficiencies. She attempts to salvage her Section 631 CIPA claim by asking the Court impermissibly to read express language out of the statute. Her Section 632 CIPA claims and her constitutional and common law privacy claims fail because she did not plead the requisite intent—and she cites no allegations in the Complaint otherwise. Her CFAA claim fails because she failed to plead that Microsoft accessed her computer or that she suffered any “actual, concrete loss” from Microsoft's alleged conduct. Her references to Wikipedia's cookies entry in her brief are not well-pleaded facts, much less allegations specific to Plaintiff capable of sustaining her CFAA claim. *Cf. Cook*, 2023 WL 5529772, at *8 (plaintiff may not speculate about how technology may have worked). Finally, Plaintiff failed to plead other key elements of her claims, including economic losses as a result of Microsoft's alleged conduct for her UCL, unjust enrichment, conversion, and larceny claims. Although she asserts the market value of her data was diminished, she does not plausibly allege that Microsoft caused that alleged diminishment or that she intended to sell her data; nor could she, as she claims such data is private and may not be disclosed.

ARGUMENT

A. Plaintiff Has Not Identified Any Well-Pleaded Facts to Sustain Her Claim.

Plaintiff does not offer a “short and plain statement” that she is entitled to relief. Mot. at 15.¹ Instead, she pleads only that sometime in the last ten years, she used the Kaiser website to search for unknown information, access unspecified records and videos, and review unidentified information about unspecified doctors, appointments, or conditions. Compl. ¶¶ 7, 105. From there she concludes that Microsoft received unspecified data from her vague website activities (at unidentified time(s) over the last decade) through unspecified technology and that she “suffered

¹ Page numbers refer to the ECF page number for filed documents.

1 harm.” *Id.* Plaintiff’s “impermissibly vague” claims do not satisfy Rule 8. *See* Mot. at 15-16
 2 (citing *Martin v. Sephora USA Inc.*, 2023 WL 2717636, at *6 (E.D. Cal. Mar. 30, 2023) (dismissing
 3 complaint where conduct allegedly occurred “sometime within the past year”)).

4 Similar pleading failures justified dismissing wiretapping and common law privacy claims
 5 in *Cook*. There, the plaintiff allegedly performed general activities on the defendant’s website,
 6 including “click[ing] on certain products and typ[ing] words into the search bar,” and Microsoft’s
 7 software allegedly collected that information. *Id.* at *1. The plaintiff’s allegations “lack[ed]
 8 critical necessary details” to support her claim. *Id.* at *7. She did not plead her specific mouse
 9 movements, keystrokes, searches, or webpages viewed, even though the “information should be
 10 available to [plaintiff]” because she allegedly browsed the website. *Id.* The court held that
 11 generalized allegations about the “potential capabilities” of a particular technology did not suffice.
 12 In short, the complaint lacked well-pleaded facts specific to the plaintiff’s actual activity on the
 13 implicated website. *Id.* at *7-8.

14 Rule 8 requires this minimum level of allegation for every litigant; it is not, as Plaintiff
 15 suggests, an enhanced burden. Plaintiff’s only authority proves Microsoft’s point. *Opp.* at 12
 16 (citing *Brodsky v. Apple, Inc.*, 445 F. Supp. 3d 110 (N.D. Cal. 2020)). In *Brodsky*, the court
 17 dismissed the plaintiffs’ claims for failure to plead “approximately when the actionable
 18 misconduct occurred.” 445 F. Supp. 3d at 135. Such allegation was critical when, as here, the
 19 allegations are so vague as to raise statute of limitations issues.

20 To the extent the Court views this as an Article III standing issue, Plaintiff’s cited authority
 21 similarly misses the mark. Plaintiff’s cases simply say the disclosure of private information **can**
 22 give rise to Article III standing. *See, e.g., In re Facebook, Inc., Consumer Priv. User Profile Litig.*,
 23 402 F. Supp. 3d 767, 784 (N.D. Cal. 2019). But Plaintiff has not alleged any facts about her private
 24 information in the first place, or that **her** private information was ever disclosed, much less by
 25 Microsoft. Plaintiff’s case *Byars v. Goodyear Tire & Rubber Co.*, 2023 WL 2996686 (C.D. Cal.
 26 Apr. 5, 2023), is directly on point. The plaintiff there lacked standing because she failed to allege

1 “she disclosed any sensitive information to Defendant, much less identif[ied] any specific personal
 2 information she disclosed that implicate[d] a protectable privacy interest.” *Id.* at *3; *accord Cook*,
 3 2023 WL 5529772, at *5 (plaintiff lacked standing because she failed to plead that “private facts”
 4 about her were disclosed to Microsoft); *Straubmuller v. JetBlue Airways Corp.*, 2023 WL
 5 5671615, at *4 (D. Md. Sep. 1, 2023) (plaintiff lacked standing because she failed to plead
 6 disclosure of personal information). So too, here, Plaintiff has not alleged disclosure of any
 7 “specific personal information” or “private facts” of *hers*, to *Microsoft*, to confer an actionable
 8 injury as a result of any conduct by Microsoft.

9 Plaintiff’s citations to the Complaint (Opp. at 14) do not save her claims because those are
 10 generalized allegations, untethered to her experience, which cannot be used to circumvent her
 11 individual pleading requirement. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 502 (1975).

12 **B. Plaintiff Consented to Kaiser’s Provision of Information to Third Parties.**

13 Plaintiff accepted Kaiser’s Privacy Statement when she signed up for and logged into
 14 Kaiser’s website—she does not dispute that.² *See* Ex. D to Microsoft’s Motion. And the Kaiser
 15 Privacy Statement disclosed that Kaiser would collect and share data regarding Kaiser website
 16 users with third-party technology providers. Ex. C to Microsoft’s Motion, § 13. Plaintiff’s consent
 17 defeats each of her claims. *See Brown v. Google LLC*, 525 F. Supp. 3d 1049, 1063 (N.D. Cal.
 18 2021) (CIPA and CFAA claims); *Smith v. Facebook, Inc.*, 262 F. Supp. 3d 943, 955-56 (N.D. Cal.
 19 2017) (common law tort and California Constitutional privacy claims).

20 Plaintiff nevertheless argues that Kaiser’s Privacy Statement was somehow invalid because
 21 it did not specifically name Microsoft as a third-party partner who may receive information, but
 22 Plaintiff cites no authority for such a requirement. Opp. at 18 (citing *Smith*, 262 F. Supp. 3d at
 23 954). The Facebook privacy policy described in *Smith* was more generalized than Kaiser’s: “We
 24

25 ² Contrary to Plaintiff’s contention, courts take judicial notice of privacy policies like
 26 Kaiser’s Privacy Statement. *E.g., Mayhall v. Amazon Web Services, Inc.*, 2022 WL 2718091, at
 *4 (W.D. Wash. May 24, 2022).

1 [Facebook] collect information when you visit or use third-party websites and apps that use our
 2 Services (like when they offer our Like button).” *Id.* The court held that even though it broadly
 3 included “any data transmitted when the visitor’s browser connects to Facebook’s servers,
 4 including cookies, referer headers, and all the parts that combine to form a browser fingerprint,”
 5 the policy provided sufficient notice to users. *Id.* (collecting cases). Kaiser’s Privacy Statement
 6 is even more specific, sufficiently identifying its disclosure practices, barring Plaintiff’s claims.³

7 **C. Plaintiff’s CIPA Claims Should Be Dismissed.**

8 **1. Both Plaintiff’s CIPA Claims Fail Because She Has Not Sufficiently**
 9 **Alleged that Microsoft Could Identify Her.**

10 Plaintiff claims the URLs generally described in her Complaint are “communications”
 11 because they disclose a user’s personal information. Opp. at 16-17. But that is not the standard,
 12 and Plaintiff’s threadbare allegations are insufficient. Mot at 19; *see also Cook*, 2023 WL
 13 5529772, at *8-9 (finding unspecified mouse movements, keystrokes, and URLs are not
 14 sufficiently detailed to state a wiretapping claim).⁴ Plaintiff concludes that the unspecified
 15 information Microsoft allegedly received (through unspecified technology) could be tied to her
 16 using “unique user identifiers.” Compl. ¶ 30. There are no plausible allegations that Microsoft
 17 assigned her a unique user identifier, what that identifier was, or that Microsoft used that identifier
 18 to collect her personal information or to tie any website activity to her.

19
 20 ³ *Brown v. Google*, 525 F. Supp. 3d 1049 (N.D. Cal. 2021), is inapposite. There, the court
 21 held Google’s broad consent regime did not sufficiently describe a specific service that Google
 22 marketed as providing heightened privacy protections (incognito mode). *Id.* at 1064. Here,
 Kaiser’s Privacy Statement specifically related to the challenged conduct; namely, transmitting
 user activity on Kaiser’s website.

23 ⁴ In particular, the court in *Cook* held that whether a URL involves contents of
 24 communications “depends ‘on how much information would be revealed by disclosure of the
 25 URL,’” but because the plaintiff failed to plead the details of those URLs, the court “simply [had]
 26 no way of knowing that information.” 2023 WL 5529772, at *9. Without the specific searches
 plaintiff conducted, the court could “only reasonably infer” that the URLs included non-content
 information. *Id.*

1 Plaintiff fails to plead any specific information about her personal experience, what
 2 information Microsoft allegedly collected, or whether and how it was purportedly linked to her.
 3 Despite bringing her case as a “Doe” plaintiff, Plaintiff has not provided any facts about any
 4 sensitive or personal identifying information that she actually communicated about herself, which
 5 is fatal to her claims. *Cf. Doe v. Goldman*, 169 F.R.D. 138, 139 (D. Nev. 1996) (noting Rule 10
 6 requires named parties unless “the plaintiff has a substantial privacy interest outweighing the
 7 presumption of openness in judicial proceedings”).

8 **2. Plaintiff’s Section 631 Claim Fails Because She Does Not Allege**
 9 **Microsoft Used Telephone or Telegraph Wires.**

10 Plaintiff does not specify under which clause of California Penal Code Section 631 she
 11 brings her claims—the first clause, relating to *wiretapping*, or the second, relating to
 12 *eavesdropping*. If her claims arise under the first clause of Section 631, they cannot proceed. That
 13 clause solely relates to tapping **telephone or telegraph wires**, which Plaintiff has not alleged.

14 In response, Plaintiff argues the statute is “dated” and encourages the Court to ignore its
 15 plain text. *Opp.* at 19. That dismisses the long line of cases that strictly applied the statute and
 16 rejected Plaintiff’s contrary reading. *See, e.g., In re Google Assistant Privacy Litig.*, 457 F. Supp.
 17 3d 797, 825 (N.D. Cal. 2020); *Mastel v. Miniclip SA*, 549 F. Supp. 3d 1129, 1135 (E.D. Cal. 2021).

18 In addition, Plaintiff’s authority is inapposite. The court in *In re Yahoo Mail Litig.*,
 19 7 F. Supp. 3d 1016 (N.D. Cal. 2014), allowed the plaintiffs’ eavesdropping claim (*i.e.*, the second
 20 clause of Section 631) to go forward, but not the wiretapping claim. *Id.* at 1036-37. And, in *In re*
 21 *Meta Pixel Healthcare Litig.*, 2022 WL 17869218 (N.D. Cal. Dec. 22, 2022), the parties never
 22 briefed whether the alleged wiretapping involved telephone or telegraph wires. *Id.* at *14. Here,
 23 because Plaintiff has not and cannot allege the tapping of any telephone or telegraph wires, any
 24 wiretapping claim under Section 631 must be dismissed.

1 **3. Plaintiff's Section 632 Claim Is Deficient and Must Also Be Dismissed.**

2 By not citing any responsive allegation in her Complaint, Plaintiff implicitly concedes that
 3 she did not plead the intent required to sustain a Section 632 claim. Opp. at 19-20. She does not
 4 dispute that she must plead Microsoft intended to capture her sensitive or confidential
 5 communications for an impermissible purpose. Mot. at 21. Instead, she simply claims
 6 "Defendants" covertly employed code so that she did not know her internet activity was
 7 transmitted back to "Defendants." Opp. at 19. That argument is not specific to Microsoft and there
 8 is no basis to assert that Microsoft codes Kaiser's website. Moreover, that statement still does not
 9 allege that Microsoft intended to capture Plaintiff's information, or that it intended to capture her
 10 confidential communications for an impermissible purpose.

11 Nor does she allege that Microsoft used an "electronic amplifying or recording device" to
 12 record her information. Opp. at 22. Instead, the alleged technology at issue is undisputedly
 13 software. Mot. at 22. While Plaintiff alleges Microsoft used "receiving servers" to eavesdrop on
 14 her communications, that conclusory allegation is not supported by any factual allegation in her
 15 Complaint. Compl., ¶ 141. The only "servers" referenced in the Complaint belong to *Qualtrics*.
 16 Compl. ¶ 66. Plaintiff does not plead any facts that *Microsoft* used servers to eavesdrop on her
 17 communications. This, too, requires dismissal.

18 **D. Plaintiff's Other Privacy Claims Are Fatally Deficient.**

19 With respect to her constitutional and common law privacy claims, Plaintiff asks the Court
 20 to connect dots that her Complaint does not. She claims she had a reasonable expectation of
 21 privacy based on her "search terms, visited URLs, prescriptions, medications, immunizations, and
 22 allergies" (Opp. at 21), but she does not describe what was so private about those pieces of data or
 23 that any of it was sent to Microsoft. She does not identify her searches or the URLs that resulted,
 24 and she does not plead that she accessed any information relating to her prescriptions, medications,
 25 or allergies. Compl. ¶¶ 7, 105. While she claims she accessed immunization records, she does not
 26 plead that any content about those immunizations was transmitted to Microsoft. *Id.* Such pleading

1 is required to state a privacy claim under the California Constitution or common law. *See In re*
 2 *Yahoo Mail Litig.*, 7 F. Supp. 3d at 1040 (mandating plaintiff to allege what specifically was
 3 “confidential” or “sensitive” in her email); *see also Doe v. Meta Platforms, Inc.*, No. 3:22-cv-
 4 03580, Dkt. 298 (N.D. Cal. Aug. 15, 2023) (plaintiffs’ privacy claims lacked allegations regarding
 5 the “sensitive health information they provided through their devices to their healthcare
 6 providers”) (emphasis in original).

7 Plaintiff’s authority merely stands for the proposition that, if properly pleaded, “detailed
 8 URL requests, app browsing histories, and search queries” can form the basis of a privacy claim.
 9 Opp. at 21. But Plaintiff has not plausibly alleged that Microsoft collected any of her private or
 10 sensitive data in the first instance. *Cook*, 2023 WL 5529772, at *7-8.

11 Plaintiff also ignores that she must plead facts demonstrating that Microsoft obtained her
 12 data with the *intent of committing theft*. *See* Mot. at 24-25 (citing *In re iPhone Application Litig.*,
 13 844 F. Supp. 2d 1040, 1063 (N.D. Cal. 2012)). She instead cites case law for the notion that courts
 14 need not determine whether an intrusion was “highly offensive” at the pleading stage. Opp. at 22.
 15 But Plaintiff must still plead facts to show that Microsoft intended to steal her information. She
 16 has not and cannot. The Court should dismiss these claims with prejudice.

17 **E. Plaintiff’s CFAA Claim Fails Because Plaintiff Has Not Pleaded a Covered**
 18 **Intrusion and Cognizable Loss.**

19 In response to Microsoft’s argument that it did not access her computer, Plaintiff claims
 20 that merely using a cookie satisfies that requirement under the CFAA. Opp. at 23. Plaintiff’s
 21 Complaint never alleges that any Microsoft cookie was placed on her computer. Instead, she
 22 alleges that Microsoft’s unspecified software “collects a user’s internet data through several unique
 23 user identifiers and cookies.” Compl. ¶ 33. Effectively conceding the point, Plaintiff cites
 24 Wikipedia to support her claim that cookies generally are placed on a user’s computer. Opp. at 23
 25 n.7. Wikipedia references in briefing do not excuse pleading deficiencies or substitute for well-
 26 pleaded facts.

Further, Plaintiff has not pleaded a cognizable loss under CFAA. *See* 18 U.S.C. 1030(g). She cites allegations regarding the “damage” to “data, a program, a system, or information” (Opp. at 24), but most of those citations pertain to Qualtrics’ conduct—not Microsoft’s. Compl. ¶¶ 66-87. Even then, the damage to which she refers relates to users generally; she does not plead that she specifically suffered those harms. The remainder of Plaintiff’s citations relate to the alleged diminished value of her data, but that legally cannot form the basis of her CFAA claim. *See, e.g., Andrews v. Sirius XM Radio Inc.*, 932 F.3d 1253, 1262 (9th Cir. 2019) (limiting the “loss” definition to “harms caused by computer intrusions, not general injuries unrelated to the hacking itself”); *Cottle v. Plaid, Inc.*, 536 F. Supp. 3d 461, 485-86 (N.D. Cal. 2021) (noting *Andrews* forecloses the diminution of value theory for CFAA claims).

Plaintiff’s reliance on the money she spent allegedly “retaining a technical expert to investigate” her claims fares no better because that purported fact appears nowhere in her Complaint. Opp. at 24. Plaintiff cannot amend her Complaint by way of briefing.

F. Plaintiff’s Unjust Enrichment Claim Must Be Dismissed.

Plaintiff’s Opposition confirms she did not allege a cognizable loss to support her unjust enrichment claim. *See* Mot. at 27-28; Opp. at 25. Plaintiff’s contention that she was harmed because of the diminished value of her private data (Opp. at 25 n.8) does not suffice. Courts have rejected the diminished value theory of harm where the plaintiff has not plausibly alleged both (1) a market for the private data; and (2) that the plaintiff intended to participate in that market. *See, e.g., Moore v. Centrelake Medical Grp., Inc.*, 83 Cal. App. 5th 515, 538 (2022) (rejecting a “lost-value-of-PII theory” because plaintiffs “did not allege they ever attempted or intended to participate in this market” for such data). While Plaintiff asserts there are exchanges where she *could* sell her private data (Compl., ¶ 94), she never alleges she planned to do so. Moreover, it is implausible that she would ever sell that data, as she describes its purported disclosure as “highly offensive.” Opp. at 22.

1 Separately, Plaintiff's unjust enrichment claim does not identify an actionable
 2 misrepresentation or omission by Microsoft. Mot. at 28 (citing *Hammerling v. Google LLC*, 2022
 3 WL 17365255 (N.D. Cal. Dec. 1, 2022) ("*Hammerling II*"). Plaintiff dismisses *Hammerling II*
 4 as inapplicable because her claims do not sound in fraud. Opp. at 26. That does not matter. The
 5 *Hammerling* plaintiffs brought privacy claims alleging Google used their smartphones to collect
 6 their data. *Id.* at *1. The court twice rejected plaintiffs' unjust enrichment claim because plaintiffs
 7 "failed to allege an actionable misrepresentation or omission." *Id.* at *12; *Hammerling v. Google*
 8 *LLC*, 615 F. Supp. 3d 1069, 1096-97 (N.D. Cal. 2022) ("*Hammerling I*"); *see also Rojas-Lozano*
 9 *v. Google, Inc.*, 159 F. Supp. 3d 1101, 1120 (N.D. Cal. 2016) (collecting cases). Plaintiff argues
 10 that her allegation that Microsoft "covertly and unlawfully" collected her personal data suffices,
 11 but it does not. That conclusory statement does not identify a misrepresentation or an omission.
 12 And indeed, Microsoft could not have made any misrepresentations or omissions to Plaintiff about
 13 her alleged data because she was a total stranger to Microsoft. Plaintiff's unjust enrichment claim
 14 cannot stand.

15 **G. Plaintiff's UCL Claim Fails.**

16 Plaintiff significantly misstates the law on statutory standing under the UCL. Opp. at 26.
 17 **First**, UCL standing is narrower and more demanding than Article III standing. *See Kwikset Corp.*
 18 *v. Super. Court*, 51 Cal. 4th 310, 324 (2011); *Rodriguez v. Google LLC*, 2021 WL 2026726, at *8
 19 (N.D. Cal. May 21, 2021) (noting UCL standing is "[o]ver and above the demands of Article III").
 20 For UCL standing, Plaintiff must plead that she lost money or property as a result of Microsoft's
 21 alleged conduct. *Campbell v. Facebook, Inc.*, 77 F. Supp. 3d 836, 849 (N.D. Cal. 2014).

22 **Second**, Plaintiff's theory that "the value of her data ... was diminished due to Defendants'
 23 conduct" (Opp. at 27) does not confer UCL standing. *See Katz-Lacabe v. Oracle America, Inc.*,
 24 2023 WL 2838118, at *8 (N.D. Cal. Apr. 6, 2023) (noting "the mere misappropriation of personal
 25 information does not establish compensable damages") (internal quotations omitted). It is not
 26 enough that Plaintiff alleges a market for private data; she must also allege that she intended to

participate in that market. *See Moore*, 83 Cal. App. 5th at 538; *Ji v. Naver Corp.*, 2022 WL 4624898, at *9 (N.D. Cal. Sept. 30, 2022) (“[T]o proceed on an economic injury theory, data privacy plaintiffs must allege the existence of a market for their data and *the impairment of the ability to participate in that market.*”) (emphasis added). “The relevant inquiry is ... whether Plaintiff [herself] can profit from [her] own data.” *Greenley v. Kochava, Inc.*, 2023 WL 4833466, at *18 (S.D. Cal. July 27, 2023). Plaintiff fails to meet that pleading standard; she merely asserts that her data allegedly has value.⁵

Third, as described in Microsoft’s Motion, because Plaintiff’s other causes of action fail, Plaintiff’s UCL claim also fails. Mot. at 29.⁶

H. Plaintiff’s Larceny and Conversion Claims Must Be Dismissed.

While Microsoft maintains that Plaintiff’s data does not constitute “property” for purpose of the alleged larceny and conversion claims and therefore those claims do not apply to her data, Mot. at 30-31, those claims fail for separate reasons as well. As to statutory larceny, Microsoft did not obtain any data “in a manner constituting theft.” Cal. Penal Code § 496; *Switzer v. Wood*, 35 Cal. App. 5th 116, 126 (2019). Any information sent to Microsoft was sent willingly by Kaiser, a party to the communication.

In response, Plaintiff contends that **Kaiser** misrepresented that it would protect Plaintiff’s information. Opp. at 30. But even if that sufficed to state a claim against Microsoft (and it does not), Plaintiff’s Complaint lacks any such allegation. Plaintiff’s sole authority, *Grouse River Outfitters, Ltd. v. Oracle Corp.*, 848 Fed. App’x 238 (2021), says only that a plaintiff may use misrepresentation to prove a larceny claim, but no such misrepresentation allegation exists here.

⁵ *In re Facebook Internet Tracking Litig.*, 956 F.3d 589 (9th Cir. 2020) (Opp. at 27), does not apply, as the plaintiffs there did not bring any UCL claims and the issue was never before the court.

⁶ Plaintiff’s effort to maintain the claims of non-California residents fails because, as to the UCL claims, she relies on “logical inferences” rather than pleading specific facts that any conduct occurred in California to support the application of California law. Opp. 29. Moreover, Plaintiff cites no authority permitting her CIPA, larceny, or conversion claims for non-California residents.

Further, there can be no misrepresentation, given that Kaiser said it may disclose website activity to third parties. Mot. at 13.

With respect to conversion, Plaintiff failed to allege the value of the personal data she asserts Microsoft converted, *see Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1030 (N.D. Cal. 2012), and makes no response on this issue in her Opposition, therefore conceding the point. *See Kroeger v. Vertex Aerospace LLC*, 2020 WL 3546086, at *8 (C.D. Cal. June 30, 2020) (holding plaintiff conceded argument by failing to address it in his opposition).

I. Plaintiff Cannot Assert Punitive Damages.

Plaintiff does not dispute the merits of Microsoft's request to dismiss her punitive damages, but instead states, without analysis, that such an argument "is not the proper subject of a motion to dismiss." Opp. at 24. Numerous courts disagree. *Panoyan v. Regalo Int'l LLC*, 2019 WL 8758897, at *3-4 (C.D. Cal. Oct. 25, 2019) (finding that a motion to dismiss, and not a motion to strike, is the proper vehicle to remove punitive damages from a complaint); *Agape Family Worship Center, Inc. v. Gridiron*, 2016 WL 633864, at *6 (C.D. Cal. Feb. 16, 2016) (same). This Court should follow suit, as Plaintiffs' punitive damages claim is untenable as a matter of law.

CONCLUSION

For these reasons and the reasons in Microsoft's Motion, the Court should dismiss the Complaint with prejudice.

Dated: September 11, 2023

Respectfully submitted,

By: /s/ Patricia A. Eakes

Patricia A. Eakes, WSBA #18888
MORGAN, LEWIS & BOCKIUS LLP
 1301 Second Avenue, Suite 2800
 Seattle, WA 98101
 Phone: (206) 407-2200
 Fax: (206) 407-2278
 Email: patty.eakes@morganlewis.com

1 Kathryn Deal, admitted *pro hac vice*
2 **MORGAN LEWIS & BOCKIUS LLP**
3 1701 Market Street
4 Philadelphia, PA 19103
5 Phone: (215) 963-5000
6 Email: kathryn.deal@morganlewis.com

7 Phillip J. Wiese, admitted *pro hac vice*
8 **MORGAN LEWIS & BOCKIUS LLP**
9 One Market, Spear Street Tower
10 San Francisco, CA 94105
11 Phone: (415) 442-1000
12 Email: phillip.wiese@morganlewis.com

13 *Attorneys for Microsoft Corporation*
14
15
16
17
18
19
20
21
22
23
24
25
26

CERTIFICATION

I certify that this memorandum contains 4,167 words, in compliance with the Local Civil Rules.

/s/ Patricia A. Eakes

Patricia A. Eakes